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No. 1027

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

ALABAMA ELECTRIC COOPERATIVE, INC., *Petitioner*

v.

SECURITIES AND EXCHANGE COMMISSION,
ALABAMA POWER COMPANY and
THE SOUTHERN COMPANY

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY

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PETITIONER'S REPLY

Two points offered by the Government may warrant a short reply.

I

In seeking to justify such a narrow interpretation of SEC's powers under the Holding Company Act, the Government (Br. Opp. p. 10) claims "it is significant" that "the Congress did not choose an agency such as the Federal Power Commission, expressly created to regu-

late utility operating functions, but chose instead the Securities and Exchange Commission, whose specialized experience was largely in the financial field." The inference which the Government would draw is totally erroneous, particularly in view of the specific action actually taken by Congress in the very statutory enactment, the Act of August 26, 1935, of which the Holding Company Act is a part.

The Act of August 26, 1935, 74th Cong., 1st Sess., chapter 687 (49 Stat. 803-863) contains two titles. Title I is the Holding Company Act (49 Stat. 817-838). Title II is a series of amendments affecting the jurisdiction and powers of the Federal Power Commission (49 Stat. 838-863).

In Title II, there was added a new Section 204 of the Federal Power Act (49 Stat. 850-851), codified as 16 U.S.C. § 824c. Subsection (a) of this Section confers jurisdiction on FPC over the issuance of securities by public utilities, and the jurisdiction is measured by a general "public interest" test.[1] Thus Subsection (a) provides that FPC shall authorize such security issues only upon finding that they are for some lawful object "compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility" and "is reasonably necessary or appropriate for such purposes". Subsection (b) authorizes FPC to grant authorizations for such security issues "upon such terms and conditions as it may find necessary or appropriate".

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[1] Recently, however, FPC put certain limitations on the factors which it will consider, at least in a case where no party or intervenor has sought to raise an issue. *Pacific Power & Light Company*, 27 FPC 623 (1962).

Subsection (f) of this Section, however, then proceeds to carve out a most extensive exemption. It specifies that "The provisions of this section [Section 204] shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission." Thus the scheme of Section 204 is to confer on FPC a general authority over security issues, in terms of "public interest" considerations and the right to attach conditions, but then to give a total exemption to those public utilities organized and operating in a State having a State commission which regulates such security issues.

But the same Title II of the Act of August 26, 1935, also added a new Section 318 of the Federal Power Act (49 Stat. 863), codified as 16 U.S.C. § 825q. This Section eliminated the possibility of double or conflicting jurisdiction as between FPC and SEC. It made SEC's jurisdiction paramount by providing that a public utility shall not be subject to FPC jurisdiction on a matter with respect to which it is subject to SEC jurisdiction under the Holding Company Act.

The combined effect of Titles I and II of this single enactment of August 26, 1935, is therefore plain. Congress decided that the complexities of the problems of regulating holding company systems made it desirable that the securities issues of registered holding companies and their subsidiaries should be regulated by SEC, and that no duplicating federal regulatory jurisdiction should be conferred on FPC. Congress likewise decided that it was not safe or appropriate to insert into the Holding Company Act, which deals with registered holding companies and their subsid-

iaries, a total exemption for certain public utilities equivalent to the exemption afforded by Section 204(f) of the Federal Power Act.

Thus Congress elected in the Holding Company Act not to follow the Federal Power Act pattern and not to make the State commission's regulatory authority a total bar to SEC's jurisdiction. Congress elected to give SEC a full measure of authority with respect to "public interest" and the imposition of appropriate conditions. Contrary to the Government's suggestion, the fact that the responsibility was lodged in SEC rather than in FPC clearly shows a broader grant of authority than if Congress had done it the other way around.

II

The Government also suggests (Br. Opp., p. 10) that significance be attached to the fact that in some thirty years SEC "has not found it necessary to assert" the kind of jurisdiction petitioner would have SEC exercise in this case.

Even an administrative agency's persistent and express refusal to assert a jurisdiction conferred on it by Congress will not diminish either its authority or its duty to carry out the law in the manner in which Congress intended. See, e.g., *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672. Here, moreover, there does not exist any long-established administrative construction to bolster the Government's narrow view of the Holding Company Act's scope and meaning. The simple fact is that, until this case arose, SEC never seems to have considered the question one way or the other.

Sometimes a question may not arise for many years because it involves a situation which is uncommon. See, *e.g., Western Pacific R. Co.* v. *United States,* 382 U.S. 237, 244. In other instances, it may be merely because the question has not been expressly raised or faced up to. But whatever the reason may have been here, now that the present question has arisen in this group of cases involving matters of large magnitude and significance, it is clearly of importance to the Holding Company Act's proper administration that SEC should not, by fundamental misinterpretation of the Act, abdicate such a substantial measure of its responsibility.

As stated in the Petition for Certiorari (p. 9, note 4), a comparable question is to be argued in the Fifth Circuit on March 28, 1966, on review of the SEC's July 29, 1965 order with respect to a subsequent Alabama Power Company application involving some $45,000,000 of financing. In addition, this petitioner has recently filed in the Fifth Circuit a petition to review the SEC's comparable February 28, 1966 order, involving $5,000,000 of the funds for Alabama Power Company's 1966 construction program. And it appears that at least one more SEC proceeding will be required to obtain approval of about $42,000,000 of financing for the remainder of Alabama Power Company's 1966 construction program.

It is, of course, correct to say, as does the companies' Brief in Opposition (pp. 7-8), that a direct conflict of decisions would be produced "when and if the Fifth Circuit reaches a result in conflict with that reached by the Court below". But for the reasons we have given, we submit that the matter is ripe for a definitive re-

view by this Court now, without requiring that we await the outcome of the cases in the Fifth Circuit.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition for Certiorari, certiorari should be granted.

Respectfully submitted,

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